No. 578.

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IN THE

Supreme Court of the United States

Filed April 16, 1902.

OCTOBER TERM OF 1901.

JOSEPH H. NESBITT AND CHARLES A. MOORE,
Appellants,
vs.
THE UNITED STATES AND THE SIOUX INDIANS.

Appeal from the Court of Claims.

No. 578.

Brief for the Appellants.

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(8,431.)

The Supreme Court of the United States

OCTOBER TERM OF 1901.

JOSEPH H. NESBITT,
ADA NESBITT, Adminix., and
CHARLES A. MOORE,
Appellants,
vs.
THE UNITED STATES AND
THE SIOUX INDIANS.

No. 578,
Indian
Depredations.

Appeal from the U. S. Court of Claims.

Brief for Appellants.

1. This cause is appealed to this honorable Court to decide a technical question of law, which involves the jurisdiction of the Court of Claims to hear and determine it on its merits.

2. This cause was filed by the claimants in the Court of Claims by petition, as the record shows, June 23, 1891, for the *recovery* on an Indian depredation incurred July 25, 1864, to the amount of $7,950.00, against the United States and the Sioux Indians, under the Indian depredation act of March 3, 1891.

3. The original claim, however, was filed in the office of the Secretary of the Interior March 2, 1891, having been made out in the office of Griggs, Rinaker & Bibb, a firm of attorneys in Beatrice, Neb., Feb. 25, 1891, and transmitted thereto, and was numbered in the Secretary's office 6850.

4. Feb. 2, 1892, Joseph H. Nesbitt, one of the claimants, and the senior partner, died, and Ada Nesbitt, his widow and administratrix, was duly admitted as a party to this suit, with Belva A. Lockwood as her attorney, who, later was made attorney of record, in place of, and by consent of Messrs. Griggs, Rinaker & Bibb.

5. The cause thereafter proceeded in due course, the claimants filing the depositions of four witnesses to maintain their claim, with the usual notice to defendant, whose attorneys duly appeared at these examinations and cross-questioned the witnesses; but the defendant filed no pleas in the case, not even the general issue, as is required to be done within sixty days after receiving the printed brief in the case, unless the time is extended by order of the court, as required by section 4 of this statute, nor until years had elapsed; the claimants had closed their case, filed their request for findings of fact and brief, put their cause on the notice book for trial and had repeatedly urged the Government's counsel to proceed with the case.

6. Oct. 24, 1901, the United States, by its attorney, John G. Thompson, by leave of court, filed the following plea:

Defendants Plea to the Jurisdiction of the Court.

"Now comes the Assistant Attorney-General, and, after leave of the court first had and obtained, for plea to the dec-

laration filed herein, says, that the court is without jurisdiction to hear and determine said cause for the reason that the depredation charged is alleged to have been committed prior to the first of July, 1865; and that no claim for such depredation was ever presented to the Secretary of the Interior or the Congress of the United States, or any superintendent, agent, subagent or commissioner authorized under any act of Congress to inquire into such claims, within the meaning of the first proviso of the second section of the act of March 3, 1891."

8. The clause sec. 2, United States Statutes, Vol. 26, page 852, under which it is sought to defeat this cause, reads as follows:

"That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government. Provided: That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed or has been or *is pending* prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent or subagent, or commissioner authorized under any act of Congress to inquire into such claims; but no case shall be considered pending *unless evidence has been presented therein;* and provided further: That all claims existing at the time of the taking effect of this act, shall be presented to the court

by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred. * * * *

9. On the hearing of this plea to the jurisdiction, the court below dismissed claimant's petition Oct. 24, 1901, in the following words, written on the back of the plea. "*Sustained* and petition dismissed under authority of Weston's case (29 C. Cls. p. 420) by the court."

From this decision the claimants by their attorney appealed Jan. 29, 1902.

10. This cause is not entirely synonymous with the Weston case, on the precedent for which it was dismissed, but if it were we would still appeal or protest against the decision, as that case, being small in amount, was not appealable.

11. The jist of the decision in the Weston case is in the second clause of the syllabus, which reads:

"The sworn allegations of the claimant appended to his claim required by rules prescribed by the Secretary of the Interior, are not evidence within the intent of the act." Now this is not law, but the opinion of the court.

12. We claim, however, that although weak, *it is testimony* in the Weston case, and we make a still stronger assertion that claimant's independent affidavit *is testimony in this case,* not perhaps, in accordance with the rules of what constitutes testimony in the Court of Claims, or in the United States Supreme Court, but such testimony as was contemplated by the act of March 3, 1901, such testimony as claimants had been accustomed to file in the Interior Department for several years previous to the passage of this

law and upon which hundreds of allowances had been found, and such testimony as the Secretary of the Interior was willing to receive in this case, did receive and gave the case the No. 6850 and notified the claimants of the filing.

See pages 3, 4, 5 and 6 of the Record.

13. We find in this cause a complete case made out in due form, in accordance with the law and the facts, and pending.

First. The statement of the claim made out very succinctly, giving dates, items, amounts and names of defendants, by a reputable firm of attorneys, who state that they "will file corroborative affidavits whenever Mr. Nesbitt is notified that this claim is filed, and will be considered by the Government."

Second. An affidavit *in extenso* by the claimant, detailing all of the particulars of the raid by the Sioux Indians, when made, how made, the number of animals taken and their value, and summing up the amount to $7,950.

Third. Exhibit "A," from the "Omaha Daily Bee," purporting to come from its Washington Bureau, giving information to claimants in that vicinity how to proceed in such cases.

14. Of course, no further testimony could be filed with Secretary of the Interior after this first filing, as he was forbidden by the act to any longer adjudicate the cases, and resort was had to the court, as contemplated.

15. Now we claim, and we do it advisedly, that every one of these papers is testimony, and such testimony as is named in the Indian depredation act of March 3, 1901. The second clause of the fourth section of which says: "In considering the merits of claims presented to the court *any tes-*

timony, affidavits, reports of special agents or other officers, and *such other papers as are now on file in the department* or in the courts relating to any such claims, *shall be considered by the court as competent evidence,* and such weight given thereto as in its judgment is right and proper."

16. The statute thus defines what is meant by *testimony in cases pending.* It does not leave it even to the discretion of the court, but says in effect that it shall accept such papers as the Secretary of the Interior in his judgment has seen fit to file in each case." It was not the intent of the law to shut out any honest claimant.

When before has it ever transpired under this Government, in Congress, the Department or the courts, that a claimant could not, by his own sworn affidavit of facts, present his claim for consideration, make his filing, have his number on the record and his cause be considered pending from that date? But the law says testimony must be filed. We have our testimony, not sufficient, perhaps, for the allowance of the case, but sufficient to have the case pending.

17. We believe that we have a right to be heard on the merits in this case in the Court of Claims, and we appeal to this higher court for such decision.

BELVA A. LOCKWOOD,
for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

JOSEPH H. NESBITT AND CHARLES A. MOORE, Appellants,
vs.
THE UNITED STATES AND THE SIOUX INDIANS. } No. 578.

Supplementary Brief for Appellants.

Statement of the Case.

This is an appeal from a judgment of the Court of Claims rendered under the Indian Depredation Act of March 3, 1891. (26 Stat. L., 851.)

By Section 2 of that Act it is provided that no claim accruing prior to July 1, 1865, shall be considered by the Court unless it had been or was pending before the Secretary of the Interior, or before Congress, or before some one of several authorized officers, at the time of the passage of the Act. The Act itself defines the term "pending" in these words: " * * * but no case

shall be considered pending unless evidence has been presented therein." (Section 2.)

The claim now sued on was presented to the Secretary of the Interior on March 2, 1891, the day before the passage of the Act, in the form of a statement of account showing the kind of property taken, the number of animals, their value, the date and place of the depredation. (Rec., p. 3.)

At the same time was filed the affidavit of one of the claimants, Nesbitt, showing the partnership, the ownership of a large number of animals, the loss of those for which the suit is brought, and other pertinent and material facts. (Rec., pp. 3, 4, 5, 6.)

The defendants filed their plea averring that the claim had not been "presented" to the Secretary of the Interior or other authorized body or officer, within the meaning of the Act of March 3, 1891. (Rec., p. 7.)

The Court of Claims sustained the plea and dismissed the petition. (Rec., p. 7.)

The plea, as to the fact it avers, seems not to be authorized by any provision of the Act in question; and is certainly not accurate in averring that the claim was not "presented," since clearly it was "presented" to the Secretary of the Interior. The Court, however, must have considered the plea as raising the issue whether the claim was "pending" within the meaning of the jurisdictional act.

Whether it was "pending" depends entirely upon whether the affidavit of the claimant Nesbitt is evidence.

By section 11 of the Act in question, it is provided:

> "That all papers, reports, evidence, records, and proceedings now on file or of record in any of the Departments * * * shall be furnished to the Court upon its order, or at the request of the Attorney General."

By Section 4 of the Act it is provided that:

> "In considering the merits of claims presented to the Court any testimony, affidavits * * * and such other papers as are now on file in the Departments relating to any such claims, shall be considered by the Court as competent evidence."

Certainly by these two provisions the law declares to be admissible as evidence before the Court, *any evidence*, reports, records or papers on file in the Interior Department, and it must be that by these declarations is determined what that evidence is which is referred to in the Act.

The error of the defendants, and of the Court of Claims, is that they would hold all claimants to the filing of evidence in the Interior Department which complied with certain prescribed rules and regulations of the Secretary; and the effect of the Court's decision is to declare that if it does not comply with those certain rules and regulations, it is not evidence. If the law had intended that nothing should be considered evidence except that which complied with those regulations, it is most reasonable to assume that it would have been so

declared in terms. At the same time it would have been most unreasonable, as will appear from an inspection of the regulations, which are copied in the defendant's brief.

If to entitle affidavits filed before the Secretary to be considered "evidence," compliance with those regulations was necessary, such compliance must of course have been complete. To fail, therefore, in any one of the particulars prescribed, would deny to the affidavits any evidentiary character. It is not a difficult matter to suppose a case wherein it would be impossible to comply with those regulations. By reference to the rules prescribed, as they appear in defendants' brief, it will be seen that it was made the duty of the claimant to file a sworn declaration setting forth a number of facts, of some of which he could not have had knowledge unless he were present, actually witnessing the depredation.

Also it will be noted that the claimant was required to file the "depositions of two or more persons having personal cognizance of the facts. * * *" If therefore the claimant had produced to the Secretary but one witness having personal cognizance of some of the facts, the claim would not be pending, under the contention of the defendants. And yet the provision of the Act of March 3, 1891, is that the claim should be considered pending "if evidence was filed therein." Is it not true that the deposition of one witness would be evidence as clearly as the depositions of two witnesses, or a dozen?

Again, if in the filing of a claim before the Secretary of the Interior the regulations had been fully complied

with, the presumption is that the Secretary would have allowed the claim under the authority of the laws under which he was proceeding. And if he had allowed the claims, they would have gone to the jurisdiction of the Court of Claims under an entirely different paragraph of the jurisdictional act, namely, that paragraph (second) relating to allowed cases.

The brief for the defendants does not fairly state the record, in the statement that the claimant filed his sworn declaration as required by the statute, and that "appended to that declaration was a bill or statement of account or letter from his attorneys." The claimant filed his statement of damages, made out and signed by his attorneys, and appended to that was, not a sworn declaration, as defendants say in their brief, but an affidavit of the claimant Nesbitt, not purporting to be a declaration, or an application, but purporting to be an affidavit in proof of the loss. It is not the statement of damages which we claim to be evidence, but the affidavit of the claimant in support of that statement.

It must be manifest to the Court that if this were the affidavit of a disinterested person, it would be evidence within the meaning of the law, so that the case would clearly have been pending. The question, therefore, is whether the affidavit of one of the interested parties is also evidence. On this point there is no distinction made in the Act, and in the absence of such distinction, there is no authority for the statement that the affidavit of a claimant, filed as proof, is not just as competent evidence as the affidavit of a disinterested person.

It is further observed that, under the provisions of this Act, any affidavit or paper filed in the office of the Secretary of the Interior is competent evidence in the Court of Claims. It would seem a strange doctrine which would declare such paper to be competent evidence in a court, and yet not to possess any evidentiary character at all before the Secretary of the Interior, who accepted and filed it.

It is to be observed in this connection that some virtue must be given to the claim because it was admitted to filing by the Secretary. It not infrequently happens that rules, even of courts, fall into disuse, and that procedure becomes a matter of custom. The authority which prescribed these rules and regulations could annul or disregard them; and we may reasonably assume that they were waived, at least, in this case, by reason of the fact of the admission of the claim to the files and the subsequent transmission of the papers to the Court of Claims.

The defendants cite and rely upon the decision of the Court of Claims in the case of Weston *vs.* U. S. (29 C. Cls., 420.) The facts in that case and this one are somewhat different. In that case the claimant filed what purported to be a "declaration for Indian depredations," which was sworn to, and accompanied this with the joint affidavit of two witnesses, declaring the claimant to be the identical person she represented herself to be, and attesting to the execution of the sworn declaration by her.

In this case, the declaration is in the form of a statement of account against the United States in which

these losses are itemized, and this is supported by an affidavit of the claimant purporting to be an affidavit, and not purporting to be a declaration. While the cases are in this respect different, it would seem that the decision of the Court in the Weston case (*supra*) has some application. The Court declared in that case that—

> "The sworn allegations of the claimant, relied upon as evidence presented to the Secretary of the Interior, were nothing more than were required by the rules of the Secretary to form part of the application for payment, and can not be considered as evidence made necessary by the Act to constitute a case pending."

The Court further declared that the evidence referred to in the Act of March 3, 1891, meant evidence "competent by the ordinary rules of law." Counsel submits that this statement is clearly erroneous. When it is borne in mind that the Interior Department was not a court presided over by men learned in the law, but was a mere Department of the Government, where it was not presumed that proceedings were conducted as in a legal forum, it does not seem reasonable that it was the purpose of Congress to require that the prosecution of a claim there be conducted in accordance with the strict rules of law in any particular.

This conclusion seems entirely warranted in the language of the act authorizing the Secretary of the Interior to examine claims of this character, where it is provided that the Secretary prescribe "the degree and character of evidence necessary to support such claims."

(17 Stat. L., p. 190.) Certainly, if it had been the purpose to require the evidence presented to the Secretary of the Interior to be such as was competent under the ordinary rules of law, he would not have been given the power to prescribe "the degree and character of evidence" to be received in support of such claims. If, therefore, the Secretary could prescribe the degree and character of the evidence he would receive, and was not bound to prescribe such evidence as would be competent under ordinary rules of law, the presumption necessarily is that the evidence filed in this case came within the degree and character prescribed by him, since he admitted it to filing and has transmitted it to the Court.

Defendants' brief refers to a passage in the opinion of the Court in the case of Weston (*supra*) surmising that the intention of Congress in making this provision was to exclude those who, while the bill was pending before Congress, hastened to make application for payment of claims. We may admit this conjecture was correct, but it can hardly be said that the benefit of the law was not to be given to a claim filed the day before the passage of the Act as well as to one filed a year before, or ten years before, if evidence was also filed to support it. For the Act of March 3, 1891, did not exclude any claims filed prior to its passage. It excluded all claims, without regard to when the application was made, if evidence was not filed in support thereof. But it made no distinction between the cases filed early or those filed late, if evidence was also filed.

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